Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

October Term, 1997

BOBBY LEE MEDFORD, individually and in his capacity as Sheriff of Buncombe County, North Carolina, *et al.*,

Cross-Petitioners,

vs.

STEVEN DOUGLAS JENKINS, *et al.*,

Cross-Respondents.

Conditional Cross-Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

WILLIAM A. BLANCATO
Counsel of Record
McCALL DOUGHTON
& BLANCATO, PLLC
Attorneys for Cross-Petitioners
633 West Fourth Street
Suite 150
Winston-Salem, NC 27101
(910) 725-7531

35 pp

QUESTIONS PRESENTED

1. Whether qualified immunity bars claims against a newly elected sheriff in North Carolina for terminating his predecessors' deputies for political reasons when organizing and staffing his office.

2. Whether a North Carolina sheriff sued in his official capacity is a representative of the state of North Carolina such that the claim is not against a "person" under 42 U.S.C. § 1983 or is barred by the 11th Amendment where no local governmental entity has any authority over the sheriff regarding personnel matters, where sheriff's deputies are employees of the sheriff and not a local governmental entity and where the State of North Carolina has directly invested the sheriff with authority to hire and fire his employees at his pleasure.

PARTIES

The plaintiffs in the district court were Steven Douglas Jenkins, David Chris Bossard, William Martin Buckner, Robert Calvin Davis, Elmeda Miller Foster, Jimmy Lynn Hungerford, Linda Cook McDaniel, Randy Lee Moss, Sandy Hoglen Moss, and Kimberly Diann Shelton, all former deputy sheriffs who had been employed by the former Sheriff of Buncombe County, North Carolina. The defendants were Bobby Lee Medford, the current Sheriff of Buncombe County, sued in his individual and official capacities, and Reliance Insurance Company, Inc., the surety on Sheriff Medford's official bond.

In the Fourth Circuit, defendant Medford was the appellant and plaintiffs were the appellees. Plaintiffs are the petitioners/cross-respondents in this proceeding and defendant Medford is the respondent/cross-petitioner.

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Defendant Bobby Lee Medford ("Sheriff Medford") respectfully petitions this Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in *Jenkins v. Medford*, 119 F. 3d 1156 (4th Cir. 1997).

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported at 116 F.3d 1156 and is reprinted in the Appendix to petitioner's petition for writ of certiorari [hereinafter "Pet. App."] at pp. A-1 to A-39. The unpublished decision of the United States District Court for the Western District of North Carolina, Asheville Division, is reprinted at Pet. App. A-40 to A-49. The Memorandum and Recommendation of Magistrate Judge Davis on Sheriff Medford's Motion to Dismiss is unreported and is reprinted in the Appendix to this conditional petition.

STATEMENT OF JURISDICTION

The Fourth Circuit Court of Appeals issued its decision and judgment in this case on August 7, 1997. Plaintiffs filed their petition for writ of certiorari on November 5, 1997. The petition was placed on the docket on November 12, 1997.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1) and Rule 12.5 of the Rules of the Supreme Court of the United States and is conditional upon this Court's grant of petitioner's petition for a writ of certiorari.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution

provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

The Eleventh Amendment to the United States Constitution provides:

> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.

42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the Untied States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

This case was decided in the courts below on Sheriff Medford's Motion to Dismiss under Rule 12(b)(6). When ruling on a Motion to Dismiss, the factual allegations of the complaint are accepted as true. *O'Hare Truck Service, Inc. v. City of Northlake*, 116 S. Ct. 2353, 2356 (1996). The statement of the facts is therefore drawn from plaintiffs' Amended Complaint.

This case arises out of Sheriff Medford's decision about how to staff and organize his office after he was elected Sheriff of Buncombe County in November 1994. Defendant Medford defeated the incumbent sheriff, Charles Long, in the election. Each plaintiff had been employed as a deputy sheriff by former Sheriff Long. Five days before taking office, Medford advised each plaintiff that he was not going to offer them positions as deputies when he took office on December 5, 1994.

Plaintiffs allege that Sheriff Medford promised his supporters and workers associated with his campaign jobs or promotions if he was elected sheriff, that plaintiffs competently performed their duties as deputies for former Sheriff Long and that none of them occupied policymaking or confidential positions. Plaintiffs further allege that they "worked for and otherwise supported opposition candidates in their political campaigns against Bobby Medford" and that they "were . . . terminated for failing to associate themselves politically with the campaign organization of defendant Medford, for speaking in favor of the opposition candidates and for associating politically with Medford's opponents," so that positions could be made available for Medford's supporters. Plaintiffs contend that Sheriff Medford violated their first amendment rights by not retaining them as deputies when he took office. Plaintiffs filed suit under 42 U.S.C. §1983 in June 1995, seven months after Sheriff Medford took office.

Sheriff Medford filed a Motion to Dismiss under Rule 12(b)(6) asserting that as a newly elected Sheriff he had the right to organize his office regardless of whether or not plaintiffs had supported opposition candidates in the election, and in the alternative, that he was entitled to qualified immunity and that plaintiffs did not state a claim against Sheriff Medford in his official capacity because they did not identify the entity for which he was making custom or policy and that the appropriate entity would be the State of North Carolina such that Sheriff Medford is not a person in his official capacity or the claims are barred by the 11th Amendment. Magistrate Judge Toliver Davis issued a Memorandum and Recommendation recommending that the Motion to Dismiss be allowed on the grounds that plaintiffs had not alleged a constitutional violation and in the alternative that Sheriff Medford was protected by the 11th Amendment as to the claims against him in his official capacity because the true party in interest is the state of North Carolina and that the claims against Sheriff Medford in his individual capacity should be dismissed under qualified immunity because the law in this area was not clearly established. Plaintiffs objected to the Memorandum and Recommendation. District Judge Thornburg declined to adopt the Memorandum and Recommendation and held that the Motion to Dismiss should be denied in all respects. Sheriff Medford appealed to the Fourth Circuit Court of Appeals in accordance with *Mitchell v. Forsyth*, 472 U.S. 511 (1985) (interlocutory appeals allowed from denials of claims of qualified immunity) and *Hess v. Port Authority Trans-Hudson Corp.*, 115 S. Ct. 394 (1994) (interlocutory appeals allowed from denial of 11th Amendment claims). About two weeks after argument before the three-judge panel in the Fourth Circuit, the Fourth Circuit on its own motion decided to consider the case *en banc*.

The Fourth Circuit issued its *en banc* decision on August 7, 1997. The Fourth Circuit noted that Sheriff Medford "would be entitled to qualified immunity," *Jenkins v. Medford*, 119 F.3d

1156, 1162 n. 37 (4th Cir. 1997), and held that in light of the legal relationship between sheriffs and their deputies in North Carolina that political considerations are appropriate when a Sheriff's elects his deputies. The Fourth Circuit never discussed the 11th Amendment issue, presumably because its decision on the merits mooted the point. The Fourth Circuit remanded the case with directions that plaintiff's action be dismissed.

REASONS FOR GRANTING THE WRIT

The two questions presented in this conditional petition for writ of certiorari are the only two questions presented to the Fourth Circuit Court of Appeals by both plaintiffs and Sheriff Medford. Neither question is included in plaintiffs petition to this Court, however. The issues of qualified immunity and whether Sheriff Medford in his official capacity is a representative of the state are inextricably intertwined with the substantive issues presented by plaintiffs' petition. If the Court decides to review this case based solely on the questions raised by plaintiffs, important issues central to the case which are alternate bases to affirm the judgment of the Court of Appeals would be ignored.

I. SHERIFF MEDFORD IS PROTECTED BY QUALIFIED IMMUNITY

Sheriff Medford has at every stage of this proceeding contended that he is protected by qualified immunity. The Memorandum and Recommendation issued by Magistrate Judge Davis found that Sheriff Medford should be protected by qualified immunity. District Judge Thornburg's opinion found that Sheriff Medford is not protected by qualified immunity. In a footnote, the Fourth Circuit noted that "Medford would be entitled to qualified immunity." *Jenkins v. Medford*, 119 F.3d at 1162 n.37. While noting that Medford would be entitled to immunity, the Fourth Circuit ultimately decided that its decision

on the merits of the claim "makes it unnecessary for us to consider wether Sheriff Medford is entitled to qualified immunity." *Jenkins*, 119 F.3d at 1165.

The Fourth Circuit applied the analysis mandated by *Elrod v. Burns*, 427 U.S. 347 (1976) and *Branti v. Finkel* 445 U.S. 507 (1980) to plaintiffs' claims that they were improperly terminated for political reasons. Plaintiffs have argued in their petition that the law in this area is uncertain and should be clarified by this Court. If the law is uncertain as plaintiffs' suggest and needs clarification then *ipso facto* the law cannot be clearly established and qualified immunity would apply. *See Anderson v. Creighton*, 483 U.S. 635 (1987).

In *Anderson*, the Court restated the basic rule governing claims of qualified immunity as follows:

> [W]hether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the "objective legal reasonableness" of the action, *Harlow [v. Fitzgerald*, 457 U.S. 800, 819 (1982)] assessed in light of the legal rules that were "clearly established" at the time it was taken, *id.* at 818.

Anderson, 483 U.S. at 639. The Court went on to state that the operation of the standard depends upon the level of generality with which the relevant legal rule is identified. Simply asserting, as plaintiffs do in this case, that it is clearly established that public employees may not be fired in violation of the First Amendment does not answer the more specific issue presented of whether the position of deputy sheriff in North Carolina is one for which political considerations are appropriate. Officials must be able "reasonably [to] anticipate when their conduct may give rise to

liability for damages." *Anderson*, 483 U.S. at 639. The *Anderson* Court therefore held that "[t]he contours of the right [allegedly violated] must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Id.* at 640. "[T]he unlawfulness must be apparent" or qualified immunity will apply. *Id.*

The Court in both *Elrod* and *Branti* acknowledged the uncertainty of applying the tests adopted. In *Elrod*, the Court stated "[n]o clear line can be drawn between policymaking and non policymaking positions." *Elrod*, 427 U.S. at 367. In *Branti*, the Court noted that "it is not always easy to determine whether a position is one in which political affiliation is a legitimate factor to be considered." *Branti*, 445 U.S. at 518.

Although the Supreme Court could not draw a line definitively answering the question presented in the instant case, several cases applying *Elrod* and *Branti* have held that a newly elected sheriff may terminate his predecessor's deputies for political reasons. *Upton v. Thompson*, 930 F.2d 1209 (7th Cir. 1991), *cert. denied*, 503 U.S. 906 (1992); *Terry v. Cook*, 866 F.2d 373 (11th Cir. 1989); *Whited v. Fields*, 581 F.Supp. 1444 (W.D.Va. 1984). Thus, someone in Sheriff Medford's position could reasonably conclude that he could take the action complained of. Neither *Elrod* nor *Branti* made the unlawfulness of the actions plaintiffs complain about "apparent."

"[T]he qualified immunity test is simply the adaptation of the fair warning standard to give officials (and, ultimately governments) the same protection from civil liability and its consequences that individuals have traditionally possessed in the face of vague criminal statutes." *United States v. Lanier*, 117 S. Ct. 1219, 1227 (1997). If the Court decides to accept the questions presented by plaintiffs for review, it would be appropriate to also consider whether the *Elrod-Branti* analysis

and its progeny provide fair warning to officials such as Sheriff Medford so they can protect themselves from civil liability.

In addition, there has been some uncertainty in the courts of appeals about how to apply qualified immunity in the context of an *Elrod-Branti* analysis. *Compare Cagle v. Gilley*, 957 F.2d 1347 (6th Cir. 1992) (newly elected Sheriff protected by qualified immunity) *with Brady v. Fort Bend County*, 58 F.3d 173 (5th Cir. 1995) (newly elected Sheriff not protected by qualified immunity). Application of qualified immunity in this area is an important federal issue that should be resolved by this Court.

II. WHEN HANDLING PERSONNEL MATTERS, SHERIFFS IN NORTH CAROLINA ARE MAKING POLICY FOR THE STATE AND THUS ARE NOT PERSONS WITHIN THE MEANING OF 42 U.S.C. § 1983 AND SUCH CLAIMS ARE BARRED BY THE ELEVENTH AMENDMENT.

The caption of plaintiffs' Complaint and Amended Complaint notes that Sheriff Medford is sued in his individual and official capacity. Neither the Complaint nor the Amended Complaint, however, identifies any custom or policy adopted by Sheriff Medford nor do they identify the entity for which any policy or custom was adopted by Sheriff Medford. Sheriff Medford has contended at every stage of this proceeding that a claim against him in his official capacity is in reality one against the state of North Carolina. Thus, in his official capacity, Sheriff Medford is not a person within a meaning of 42 U.S.C. § 1983. *See Will v. Michigan Department of State Police*, 491 U.S. 58 (1989).

Magistrate Judge Davis considered this argument and found that a sheriff in his official capacity is representing the state and that plaintiffs' claims are barred by the Eleventh Amendment.

Judge Thornburg never determined what entity Sheriff Medford could be making policy for, but nevertheless determined that plaintiffs' claims were not barred by the Eleventh Amendment. The Fourth Circuit never reached the issue, although it was briefed and argued, presumably because its holding mooted the point. This Court may decide it is premature to resolve this issue without having heard from the Fourth Circuit. *See, e.g., Dandridge v. Williams*, 397 U.S. 471, 475 n.6 (1970). At the very least, however, the Court should consider accepting the question, if plaintiffs' petition is granted, and remanding the issue to the Fourth Circuit for consideration in light of this Court's recent decision in *McMillian v. Monroe County*, 117 S. Ct. 1734 (1997).

An official-capacity suit is simply "another way of pleading an action against an entity of which an officer is an agent." *Kentucky v. Graham*, 473 U.S. 159, 165 (1995). In the instant case, plaintiffs have refused to identify the entity against which they seek a recovery. They have never identified the government entity Sheriff Medford supposedly represents. Significantly, plaintiffs filed an Amended Complaint after Sheriff Medford moved to dismiss and after Magistrate Judge Davis issued his Memorandum and Recommendation. Even though the issue had been raised, briefed and preliminarily determined, plaintiffs' Amended Complaint still failed to identify the entity they believe Sheriff Medford is representing and against which a judgment would run. *See Kentucky v. Graham*, 473 U.S. at 166 (a judgment in an official-capacity suit will be executed against a governmental entity). The device of asserting claims against public officials in their official capacity is a remnant of the days when those entities could not be sued directly. *See Kentucky v. Graham*, 473 U.S. at 167 n.14. The device is subject to abuse, as illustrated by this case, where plaintiffs assert an official capacity claim but fail to identify the entity against which they are seeking a judgment. If the entity is not identified, it may not

know it is at risk and may fail to enter a defense until it is too late. *See Barrett v. Thomas*, 649 F.2d 1193, 1202 (5th Cir. 1981), *cert denied*, 456 U.S. 925 (1982). Resources are also wasted trying to determine which entity plaintiffs are trying to sue.

Determining the entity represented by a sheriff is made by reference to state law. *McMillian*, 117 S. Ct. at 1737. That entity must, of course, be a legal entity with the capacity to be sued. F.R.Civ.P. 17(b). There are only two legal entities a sheriff can represent -- the county or the state.

In North Carolina, deputy sheriffs are not county employees and the county is not responsible for the sheriff's personnel decisions. In *Peele v. Provident Mutual Life Insurance Co.*, 90 N.C. App. 447, 368 S.E.2d 892, *rev. denied*, 323 N.C. 366, 373 S.E.2d 547 (1988), a discharged sheriff's dispatcher brought an action against the County Board of Commissioners, members of the Board and the sheriff claiming she was wrongly discharged. The North Carolina Court of Appeals held "that plaintiff was an employee of the sheriff and not Watauga County and its Board of Commissioners." *Peele*, 368 S.E.2d at 894. The holding in *Peele* is consistent with the law which had been stated over 50 years earlier that "[deputies] are appointed by an act of the sheriff, who alone is responsible for their conduct." *Styers v. Forsyth County*, 212 N.C. 558, 194 S.E. 305, 307 (1937). In short, deputies are employees of the sheriff, not the county, and the county is not responsible for the sheriff's personnel actions. *See also Clark v. Burke County*, 117 N.C. App. 85, 450 S.E.2d 747, 749 (1994) (in a case rising out of an automobile accident, the court held that a deputy is an employee of the sheriff and not the county and that the county could not liable for the deputy's tortious conduct). The federal courts in North Carolina considering challenges to employment decisions of sheriffs have also concluded that the county cannot be held

responsible. *Hughes v. Bedsole*, 913 F.Supp. 420, 426 (E.D.N.C. 1994), *aff'd*, 48 F.3d 1376 (4th Cir.), *cert. denied*, 116 S. Ct. 190 (1995).

There has to be a government entity against which a judgment may run to support an official capacity suit. *Kentucky v. Graham*, 473 at 166. The county is not it. The Buncombe County Sheriff's Department is not a legal entity with the capacity to be sued and thus cannot be the governmental entity against which a judgment may lie. *Hughes*, 913 F.Supp at 426. The only entity that can be the target of an official capacity suit against a sheriff in North Carolina is the entity that created his position and invested him with the authority to handle personnel -- the state of North Carolina. Indeed, the North Carolina Court of Appeals has held that a sheriff sued in his official capacity under 42 U.S.C. § 1983 is a state official and thus not a person within the meaning of § 1983. *Slade v. Vernon*, 110 N.C. App. 422, 429 S.E.2d 744, 748 (1993); *Messick v. Catawba County*, 110 N.C. App. 707, 431 S.E.2d 489, 493, *rev. denied*, 334 N.C. 621, 435 S.E.2d 336 (1993); *accord Harris v. County of Forsyth*, 921 F.Supp. 325, 333 (M.D.N.C. 1996).

The only "entity of which [a sheriff] is an agent" is the state of North Carolina. *Kentucky v. Graham*, 473 U.S. at 165. A claim against a sheriff in his official capacity "is no different from a suit against the State itself." *Will*, 491 U.S. at 71. A state is not a person under 42 U.S.C. § 1983 and plaintiffs may not pursue a claim against Sheriff Medford in his official capacity. *Id.* In addition, because a claim against a sheriff in his official capacity is in reality a claim against the state, such claims are barred by the Eleventh Amendment. *See Cromer v. Brown*, 88 F.3d 1315 (4th Cir. 1996).

Plaintiffs have already asserted in their petition that these issues were not reached by the Fourth Circuit because of its prior

decision in *Harter v. Vernon*, 101 F.3d 334 (4th Cir. 1996), *cert. denied*, 117 S. Ct. 2511 (1997), that the Eleventh Amendment does not apply to North Carolina sheriffs. Plaintiffs' Petition for Writ of Certiorari p.4 n.1. The *Harter* decision is however, seriously flawed in two respects. First, the court in *Harter* placed undue weight on the fact that the state treasury would not be responsible for paying any judgment. *Harter*, 101 F.3d at 337. As this Court made clear last term, the Eleventh Amendment protects the state from the risk of adverse judgments regardless of whether the state will ultimately have to pay the judgment. *Regents of the University of California v. Doe*, 117 S.Ct. 900, 905 (1997). Second, and more importantly, *Harter* failed to determine which entity would be responsible for a judgment entered against a sheriff in his official capacity. This inquiry is essential to resolving the question. *See McMillian*. It is impossible to apply the 11th Amendment unless the entity which is the target of the suit is first identified.

The analysis the Fourth Circuit has employed to resolve these issues is seriously flawed and contradicts the analysis mandated by *McMillian* where the Court began the inquiry by determining which entity the sheriff for Monroe County, Alabama represented. Proper application of the Eleventh Amendment is an important federal issue. If the court grants plaintiffs' petition, it should also review this issue and instruct the Fourth Circuit to first identify the relevant entity and then determine if that entity is protected by the 11th Amendment.

CONCLUSION

Should this Court grant the petition for writ of certiorari the issues of qualified immunity and whether plaintiffs can pursue a claim against Sheriff Medford in his official capacity merit review because of the substantial federal questions raised.

Based on the foregoing, should the Court grant the petition for writ of certiorari, it is respectfully requested that the Court also grant this conditional cross-petition for writ of certiorari.

Dated: December 12, 1997.

Respectfully submitted,

William A. Blancato
N.C. State Bar No. 12729
McCALL DOUGHTON
& BLANCATO, PLLC
633 West Fourth Street,
Suite 150
Winston-Salem, NC 27101
(910) 725-7531
Counsel for Cross-Petitioners

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT
OF NORTH CAROLINA
ASHEVILLE DIVISION
1:95CV126-T

STEVEN DOUGLAS JENKINS; DAVID CHRIS BOSSARD; WILLIAM MARTIN BUCKNER; ROBERT CALVIN DAVIS; ELMEDA MILLER FOSTER; JIMMY LYNN HUNGERFORD; LINDA COOK McDANIEL; RANDY LEE MOSS; SANDY HOGLEN HOSS; and KIMBERLY DIANN SHELTON,	)	
Plaintiffs,	)	MEMORANDUM AND
Vs.	)	RECOMMENDATION
BOBBY LEE MEDFORD, individually and in his official capacity as Sheriff of Buncombe County, North Carolina,	)	
Defendant.	)	

PURSUANT TO 28, UNITED STATES CODE, SECTION 636(b) and the standing orders of designation entered by the district court, the undersigned magistrate judge has reviewed defendant's Motion to Dismiss, plaintiffs' response, and defendant's reply. Having considered defendant's motion and reviewed the pleadings, the undersigned respectfully enters the

following findings, conclusions, and recommendation.

FINDINGS AND CONCLUSIONS

I. Applicable Standard

Defendant has moved for dismissal pursuant to Rule 12(b) (6), Federal Rules of Civil Procedure, contending that plaintiffs have failed to state a cognizable claim. Rule 12(b)(6) authorizes dismissal based on a dispositive issue of law. *Neitzke v. Williams*, 490 U.S. 319, 109 S.Ct. 1827, 1832 (1989); *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984); *Conley v. Gibson*, 355 U.S. 41 (1957). As the Court discussed in *Neitzke*:

> This procedure [for dismissal], operating on the assumption that the factual allegations in the complaint are true, streamlines litigation by dispensing with needless discovery and fact finding. Nothing in Rule 12(b)(6) confines its sweep to claims of law which are obviously insupportable. On the contrary, if as a matter of law "it is clear that no relief could be granted under any set of facts . . . a claim must be dismissed, without regard to whether it is based on outlandish legal theory . . . . What Rule 12(b)(6) does not countenance are dismissals based on judge's disbelief of a complaint's factual allegations."

Id., at 1832 (citation omitted). For the limited purpose of ruling on defendant's motion, the court has accepted as true the facts alleged by plaintiffs in the complaint and will view them in a light most favorable to plaintiffs.

II. Factual Background

In this action, plaintiffs allege that defendant-the newly elected Sheriff of Buncombe County, North Carolina-failed to rehire them as deputy sheriffs based on their support of his opponents in the 1994 elections. Plaintiffs contend that defendant's actions violated their first-amendment rights to freedom of association and to political belief and expression and each plaintiff's fourteenth-amendment right to due process of law. They bring their action under 42, United States Code, Section 1983, and defendant, asserting that they have failed to state a claim, seeks dismissal under Rule 12(b)(6), Federal Rules of Civil Procedure. Defendant also argues that he is entitled to dismissal under the doctrine of qualified immunity because if this court were to now find such acts violative of the first and fourteenth azendments, that finding would be a "new" rule of law, inasmuch as it had not been established at the time defendant failed to rehire plaintiffs.

Plaintiffs' factual allegations are succinctly summarized in their responsive brief and are incorporated herein by reference. See Plaintiffs' Response, at 2-4. A thumbnail sketch of the facts alleged by plaintiffs would include that all plaintiffs served under former Sheriff Charles Long, a democrat; all campaigned against or publicly opposed defendant's election; all were qualified for the positions they held and had served Sheriff Long and the citizens of Buncombe County honorably; and, based solely upon their political affiliation, they were not rehired. On December 5, 1994-the day defendant took office-each plaintiff was delivered a letter of notification that his or her employment had been terminated.

III. Discussion

A. Introduction

The pending motion and the viability of this action pivot on the narrow legal question of whether a newly elected sheriff in North Carolina lawfully can terminate the employment of deputy sheriffs based on "raw patronage."[1] In Section B, the undersigned discusses the substantive issue and determines that no cause of action exists when a North Carolina sheriff, for purely political reasons, terminates or does not retain the employees of his predecessor. In order to afford the district court a complete recommendation, the undersigned also makes the alternative recommendation that even if it were determined that the contested employment decisions violated the first and fourteenth amendments, defendant, sued in his official capacity, is immune from suit, and, sued in his personal capacity, is entitled to qualified immunity from money damages because the particular right asserted by plaintiffs was not clearly established at the time the adverse employment decisions were made.

B. Patronage

Although the question pesed by defendant in his motion appears simple, the answer is complex and anything but certain. In *Elrod v. Burns*, 427 U.S. 347 (1976), the Supreme Court approved the practice of dismissing public employees who held "policy making"[1] or "confidential" positions. *Id.*, at 367. In *Branti v. Finkel*, 445 U.S. 507 (1980), the constitutional test was altered and the question to be posed was whether the employer

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[1] A term of art described in *Jones v Dodson*, 727 F.2d 1329 (4th Cir. 1984), which has not been objected to by either party to this action.

"can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved." *Id.*, at 518. In refining the *Elrod* test, the Court in *Branti* held, as follows:

> [P]arty affiliation may be an acceptable requirement for some types of government employment. Thus, if an employee's private political beliefs would interfere with the discharge of his public duties, his First Amendment rights may be required to yield to the state's vital interest in maintaining governmental effectiveness and efficiency . . . The question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved.

445 U.S., at 517-18. "[M]ost policy-making, and confidential employees" are exempt and subject to termination based on political affiliation. *Stott v. Haworth*, 916 F.2d 134, 142 (4th Cir. 1990).

In his dissent in *Rutan v. Republican Party of Illinois*, 497 U.S. 62 (1990), Justice Scalia argued that Branti gave the legal profession and the public little guidance:

> What [the above-quoted language from *Branti*] means is anybody's guess. The Courts of Appeals have devised various tests for determining when "affiliation is an appropriate requirement." These interpretations of *Branti* are not only significantly at variance with each other; they are still so general that for most positions it is impossible to know whether party affiliation is a permissible

requirement until a court renders its decision.

> A few examples will illustrate the shambles Branti has produced. A city cannot fire a deputy sheriff because of his political affiliation, [citing *Jones v. Dodson, supra*] but then again perhaps it can, especially if he is called the "police captain."

Id., at 111 (citations and notes omitted).[2]

Plaintiffs in this case rely on the *Jones* decision for the proposition that their termination violated the first and fourteenth amendments to the Constitution. Defendant argues that *Jones* is not controlling and is factually distinguishable from this particular case. Instead, defendant argues, *Whited v. Fields*, 581 F. Supp. 1444 (W.Va. 1984)-a district-court decision-supplies the rule of law because the facts are nearly identical and the decision was made in light of *Jones*.

In *Jones*, a sheriff terminated the employment of two deputies he discovered or believed were campaigning against him. In *Whited*, a newly elected sheriff decided not to retain the deputies of an outgoing sheriff-a decision the district court found did not violate the Constitution even where it was a "purely political patronage decision." *Id.*, at 1448. In *Terry v. Cook*, 866 F.2d 373 (llth Cir. 1989)-a case identical to the one before this court-the Court of Appeals for the Eleventh Circuit held:

The closeness and cooperation required between

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[2] Chief Justice Rehnquist, Justice Kennedy, and Justice O'Connor joined in this part of Justice Scalia's dissent.

> sheriffs and their deputies necessitates the sheriff's absolute authority over their appointment and/or retention.
>
> Under the *Elrod-Branti* standard, loyalty to the individual sheriff and the goals and policies he seeks to implement through his office is an appropriate requirement for the effective performance of a deputy sheriff. Such a requirement strikes at the heart of the *Elrod-Branti* least restrictive means test . . . . We can find no less restrictive means for meeting the needs of public service in the case of the sheriff's deputy than to acknowledge a sheriff's absolute authority of appointment and decline to reinstate those who did not support him.

Id., at 377.

While the *Whited* case concerned a sheriff in the Commonwealth of Virginia and the Terry decision involved a sheriff in Alabama, the undersigned can fathom no substantive distinction between those positions and the office of sheriff in North Carolina. *See Brewster v. Barnes*, 788 F.2d 985, 990 (4th Cir. 1986). Historically, the position of sheriff in North Carolina has been tied not only to law enforcement, but to governance. In 1754, sheriffs were appointed by the English Crown to collect quitrents from county residents. In 1776, the English system was little changed when the State of North Carolina, as one of its first legislative acts, created the office of sheriff, which was filled by legislative appointment. It was not until 1829 that citizens of North Carolina were given the authority to elect their sheriffs. As

historical commentators have noted,[3] a sheriff headed county government and held the unique position of representing state government on a local basis. Although the North Carolina Constitution has been reworked several times in the last two centuries, the method of selecting a sheriff has undergone little change, despite the urging of reformers. Today, the office of sheriff is establish by Article VII, Section 2, of the North Carolina Constitution (1970). The extraordinary role a sheriff plays in North Carolina's system of justice is nowhere better defined than in Chapter 17E-1, which provides:

> The General Assembly finds and declares that the office of sheriff, the office of deputy sheriff and the other officers and employees of the sheriff of a county are unique among all of the law-enforcement offices of North Carolina. The administration of criminal justice has been declared by Chapter 17C of the General Statutes to be of statewide concern to the people of the State. The Sheriff is the only officer of local government required by the Constitution. The sheriff, in addition to his criminal justice responsibilities, is the only officer who is also responsible for the courts of the State, and acting as their bailiff and marshall. The sheriff administers and executes criminal and civil justice and acts as the *ex officio* detention officer.
>
> The deputy sheriff has been held by the Supreme Court of this State to hold an office of special trust and confidence, acting in the name of and with powers coterminous with his principal,

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[3] Hugh Lefler, *North Carolina History*.

the elected sheriff.

> The offices of sheriff and deputy sheriff are therefore of special concern to the public health, safety, welfare and morals of the people of the State.

N.C. Gen. Stat. § 17E-1 (as revised by 1995 N.C. Sess. Laws 103).

While it is undisputed that the sheriff is a state official, Chapter 153A-103 of the North Carolina General Statutes delegates to the respective county boards of commissioners the responsibility for determining the number of salaried employees allotted to a sheriff. The sheriff is given unfettered discretion under Chapter 153A-103(1) as to the hiring, discharge, and supervision of those salaried employees. The commissioners' only authority in employment decisions comes when a sheriff wants to hire a near relative or a person convicted of a crime of moral turpitude. N.C. Gen. Stat. 153A-103(1).

The enactments of North Carolina's legislature and the decisions of its courts continually refer to a deputy sheriff as acting in the sheriff's name and to the sheriff as having a common-law right to appoint deputies. *See Gowens v. Alamance County*, 216 N.C. 107 (1939). Throughout the history of the State of North Carolina, the election of a new sheriff has meant that deputies appointed by the defeated sheriff should start looking for work, while supporters of the incoming sheriff could reasonably expect to receive patronage employment as deputies. Plaintiffs, as appointees of Sheriff Long, cannot claim surprise. The practice of newly elected sheriffs replacing deputies is no secret. As plaintiffs state in their brief, defendant openly stated

in his campaign, as do most candidates for sheriff, that he would bring in his own people. Whether real or perceived, there is a symbiotic relationship between a sheriff and his deputies in North Carolina counties. Party and personal allegiance have always been prerequisites for being employed, much less retained by a successor administration, as a sheriff's deputy. While an exception exists in the context of *respondent-superior* claims under 42, United States Code, Section 1983, *Westmoreland v. Brown*, 883 F. Supp. 67 (E.D.Va. 1995), state law considers a sheriff and his deputies to be one and the same person. *Gowens v. Alamance, supra*. In light of the exception carved out by the Court in *Branti*, political patronage in public employment is constitutional when "party affiliation is an appropriate requirement for the *effective* performance of the public office." *Id.*, at 517-18 (emphasis added). Where state law imputes an identity between the elected official and his staff, it would be absurd to find that the elected official would be forced to either retain or hire those whose loyalty is to the opposition which desires to see the elected official fail. Review of the cases from the Fourth Circuit and other courts reveals that no cause of action arises under the first and fourteenth amendments when a newly elected sheriff in North Carolina fires or fails to retain the deputies of his predecessor *en masse* for purely political reasons.

C. Eleventh-Amendment Immunity and Qualified Immunity

1. Eleventh-Amendment Immunity: Official Capacity

In *Will v. Michigan Dept. of State Police*, 491 U.S. 58 (1989), the United States Supreme Court held that neither a state nor its officials acting in their official capacities is a person for the purposes of Section 1983. *Id.* at 71. Section 1983 permits actions only against "persons" who deprive others of any rights,

privileges, or immunities secured by the Constitution and laws.

For purposes of determining the applicability of the civil-rights statute, it is a question of state law whether a county sheriff may be considered an officer of the state. *See Pembaur v. City of Cincinnati*, 475 U.S. 469, 484 (1986). In the most recent opinions on point, the North Carolina Court of Appeals held that a sheriff is a state official. *Slade v. Vernon*, 110 N.C. App. 422 (1993); *Messick v. Catawba County*, 110 N.C. App. 707 (1993). Applying such state law to Section 1983 in light of *Pembaur*, it is clear that a sheriff is an official of the State of North Carolina and that a suit against a sheriff in his official capacity is a suit against the State of North Carolina. The State of North Carolina enjoys eleventh-amendment immunity from suit and has not waived that immunity. *Moreno v. University of Md.*, 645 F.2d 217 (4th Cir. 1981), *aff'd*, 458 U.S. 1 (1982). Absent waiver or consent, the eleventh amendment bars suits directly against a state or its agencies, regardless of the nature of relief sought. *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89 (1984). The eleventh-amendment bar is effective, whether the state is a named party or a party in fact. *Scheuer v. Rhodes*, 416 U.S. 232, 237 (1974). Inasmuch as it is absolutely immune under the eleventh amendment, the undersigned must recommend that this action be dismissed as to the party in fact-the State of North Carolina-as well as defendant sued in his official capacity.

2. Qualified Immunity: Personal Capacity for Monetary Damages

Public officials are free from liability for monetary damages if they can plead and prove that their conduct did not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 815-16 (1982). In *Mitchell v. Forsyth*, 472 U.S. 511 (1985), the Supreme Court held that qualified

immunity is "immunity from suit rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if the case is erroneously permitted to go to trial." *Id.* at 526. Qualified immunity is a question of law.

When a defendant moves for dismissal on the ground of qualified immunity, the court "considers in the light most favorable to the plaintiff[s] all facts fairly inferable from the record--regardless of the existence of factual dispute -- and decides whether, under those facts, [defendant's] conduct violated law clearly established at the time." *Bennett v. Parker*, 898 F.2d 1530 n.2 (11th Cir. 1990). All inferences, including credibility of an affiant, are drawn in favor of a plaintiff for qualified-immunity purposes. *Gordon v. Kidd*, 971 F.2d 1087, 1093-94 (4th Cir. 1992). As discussed above, this court has taken all facts alleged by plaintiffs as true; specifically, that their employment in the sheriff's office was terminated based on political rather than performance criteria.

Even if it were determined that defendant's acts violated plaintiffs' first- and fourteenth-amendment protections, the undersigned would be compelled to recommend that this action be dismissed against defendant in his personal capacity because such protections were not clearly established at the time the acts complained of occurred. Not only is a clear legal decision indicating the existence of such right absent, a reasonable person may very well have found the *Whited* and *Terry* decisions and considered Chapter 153A-103 of the North Carolina General Statutes in the context of the decisions of the state courts and the unequivocal expression of the state legislature found in Chapter 17E, all of which would have affirmatively indicated that "party affiliation is an appropriate requirement for the effective performance" of the office of sheriff. *Branti v. Finkel, supra,* at 517-18 (emphasis added). As the Court of Appeals for the Fourth Circuit stated in *Marciariello v. Sumner*, 973 F.2d 295

(4th Cir. 1992), "[o]fficials are not liable for bad guesses in gray areas; they are liable for transgressing bright lines." *Id.*, at 298. In the event the district court finds that plaintiffs have stated a claim for relief, the undersigned recommends, in the alternative, that all claims against defendant in his personal capacity for monetary damages be dismissed based on the doctrine of qualified immunity.

RECOMMENDATION

IT IS, THEREFORE, RESPECTFULLY RECOMMENDED that

(1) defendant's Motion to Dismiss be **ALLOWED**, and that plaintiffs' claims asserted under 42, United States Code, Section 1983, for alleged violation of their first- and fourteenth-amendment rights be **DISMISSED** under Rule 12(b)(6), Federal Rules of Civil Procedure, because plaintiffs have failed to state cognizable claims; and, alternatively,

(2) all claims damages against defendant in his official capacity be **DISMISSED** because defendant, sued in such capacity, is not a person within the meaning of 42, United States Code, Section 1983; and

(3) all claims for money damages against defendant, sued in his personal capacity, be **DISMISSED** because defendant, sued in such capacity, enjoys the protections of qualified immunity.

The parties are hereby advised that, pursuant to 28, United States Code, Section 636(b)(1)(C), written objections to the findings of fact, conclusions of law, and recommendation

contained herein must be filed within ten (10) days of service of same. Failure to file objections to this Memorandum and Recommendation with the district court will preclude the parties from raising such objections on appeal. *Thomas v. Arn*, 474 U.S. 140 (1985), *reh'g denied*, 474 U.S. 1111 (1986); *United States v. Schronce*, 727 F.2d 91 (4th Cir.), *cert. denied*, 467 U.S. 1208 (1984).

This Memorandum and Recommendation is entered in response to defendant's Motion to Dismiss (#6).

This 27th day of November, 1995.

J. TOLIVER DAVIS
UNITED STATES MAGISTRATE JUDGE